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441-396—71——2

In the Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71–22 and 71–44

LEWIS VINCENT D'AVANZO, PETITIONER

v.

UNITED STATES OF AMERICA

VINCENT ANTHONY FALCONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. No. 71–22, App. B; Pet. No. 71–44, App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. No. 71–22, App. A; Pet. No. 71–44, App. A) was entered on June 9, 1971. The petition for a writ of certiorari in No. 71–22 was filed on July 6, 1971; the petition in No.

441-396—71——1

71-44 was filed on July 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case, federal agents could properly look into the open-topped body of petitioners' truck, immediately after it had been parked on a public street and petitioners had fled on foot, in an effort to ascertain the nature of the extremely heavy cargo that was being transported.

2. Whether a comment by the trial judge to the jury regarding his ruling in a pretrial hearing deprived petitioners of a fair trial.

3. Whether the trial court's instructions to the jury were erroneous.

4. Whether certain statements by the prosecutor during his summation were prejudicial.

5. Whether the evidence is sufficient to support the conviction of petitioner D'Avanzo on all counts.

STATEMENT

After a joint trial by jury in the United States District Court for the Eastern District of New York, petitioners were convicted on the first three counts of a four-count indictment, charging them with possessing a quantity of mercury stolen from a shipment consigned in foreign commerce, in violation of 18 U.S.C. 659 (count 1), transporting a stolen truck in interstate commerce, in violation of 18 U.S.C. 2312 (count 2), transporting stolen mercury in interstate commerce, in violation of 18 U.S.C. 2314 (count 3), and concealing the stolen mercury, in violation of 18 U.S.C. 2315

(count 4).[1] On December 4, 1970, petitioner D'Avanzo was sentenced to concurrent terms of imprisonment for ten years under counts 1 and 3, subject to the parole provisions of 18 U.S.C. 4208(a)(2); petitioner Falcone was sentenced to concurrent terms of imprisonment for five years on counts 1 and 3, also subject to 18 U.S.C. 4208(a)(2). On count 2, the sentence was probation for five years as to D'Avanzo and for three years as to Falcone. The court of appeals affirmed *per curiam* (Pet. No. 71–22; App. B; Pet. No. 71–44, App. B).

In May 1969, a ship containing as part of its cargo 400 cylinders of mercury arrived at Pier 20, Staten Island, New York. Each cylinder weighed approximately 100 pounds and was the size of an oxygen tank (Tr. 225–230, 565). On June 3, 1969, a truck laden with the cylinders of mercury was hijacked (Tr. 236). The police were notified and, later that day, they located the truck, now empty, in Brooklyn near the Verrazano Bridge (H. 268). The fuel guage indicated that the hijackers had not driven the truck very far (H. 272; Tr. 240). Accordingly, a number of F.B.I. agents were assigned surveillance duty in the Staten Island area to watch various warehouses and trucking companies (Tr. 254).

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[1] The trial court dismissed count 4 on its own motion at the end of the case (C. 4). "C." refers to the transcript of the court's closing charge, which has been paginated separately from the transcript of trial ("Tr."). The transcript of a pretrial hearing on petitioners' motion to suppress is referred to as "H." We are lodging these transcripts with the Clerk of this Court.

At about 7:00 p.m. on the evening of June 5, 1969, Agent George Moresco observed a large truck, which resembled a dump-truck and had the name "Falcone" written in white on its cab, parked in front of the Caton Scrap Metal Yard. The body was enclosed on three sides but had no top (Tr. 264).[2] The agent noticed that the rear axle was low, indicating that the truck contained a heavy load (Tr. 268).

Shortly thereafter, the truck emerged from the Caton Metal Yard gate; Moresco and other agents followed. At a service station not far from the Goethels Bridge in New Jersey the truck stopped and the driver, later identified as petitioner D'Avanzo (Tr. 304),[3] made a telephone call. He then drove north, stopping next at a diner near the George Washington Bridge; he again made a telephone call (Tr. 301). Thereafter D'Avanzo and his passenger, petitioner Falcone, drove across the bridge and proceeded to the Connecticut Turnpike. On the turnpike near Darien, Connecticut, D'Avanzo made another stop at a restaurant. After making a third telephone call, and conversing with an unidentified individual seated in a car and with the driver of a truck which bore the inscription "Infield Metals Company" (Tr. 272, 305; H. 215), D'Avanzo, still accompanied by Falcone, drove the truck to the Bridgeport exit. He there left the turnpike and, still followed by federal agents, proceeded on state roads to Watertown, Connecticut, arriving there at approximately 2:00 a.m.

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[2] As expained below (p. 8 *infra*), at that time, the agent had reason to regard Falcone, a scrap metal operator, as a possible suspect involved in the disposition of stolen mercury.

[3] D'Avanzo was employed at the Caton Scrap Metal Yard (H. 276).

In Watertown, the agents observed the truck start to turn onto the street where the Infeld Metals Company was located; however, it then continued on for a few blocks and turned into a U-shaped residential street, where it was parked. The agents observed petitioners leave the truck and walk in their direction. As they approached Agent James Hays, they stopped, hesitated, and then turned and headed at a trot in the opposite direction into a swampy wooded area (Tr. 311, 571–573).

Agent Hays then drove his car to the truck and parked. Because the side panels were too high for him to see inside from street level, he climbed onto a ledge on the side of the truck and, using a flashlight, looked into the open top. Agent Hays observed that the truck's cargo was largely covered by a tarpaulin; without disturbing the tarpaulin, however, he could see four or five cylinders that were exposed. The agent recognized the unmarked cylinders as a type which usually contained chemicals (Tr. 312–313).

Agent Hays then assigned other agents to remain at the site of the parked truck; he set out to find petitioners. Approximately twenty minutes later, Hays learned from a local policeman, Thomas Kennedy, that Kennedy had just stopped an individual approximately a mile from the parked truck and had asked what he was doing in the area at that time of night. The individual had stated that he was hitchhiking; he had inquired about trains or buses that he could board at that time. When Kennedy replied that there were none, the individual asked for the location of a telephone booth. Kennedy had directed him to a gaso-

line station and had then radioed for assistance in apprehending the individual for disorderly conduct. Hays agreed to assist in the arrest. The two officers proceeded to the service station and Hays helped Kennedy take D'Avanzo into local custody at about 3:00 a.m. (H. 230–233; Tr. 313–314). At this time D'Avanzo's clothes were disheveled, he was perspiring heavily, and his trousers were wet up to the knees (Tr. 321).

Prior to arresting D'Avanzo, Officer Kennedy told Agent Hays that he had also seen an individual fitting the description of Falcone proceeding in the opposite direction (Tr. 468–469). At approximately 5:00 a.m., local police officer Michael Ezzo, who had earlier responded to Kennedy's request for aid and had been given a description of Falcone (H. 49–53), saw Falcone walking. Ezzo noticed that the lower portion of Falcone's trousers were wet (H. 56). He stopped Falcone and asked his name and where he was going. Falcone identified himself and replied that his car had broken down as he was heading toward his sister's home in Westhaven. Ezzo indicated that Westhaven was in the opposite direction. Falcone then said that he was unsure of himself because he had been drinking too much. Although Falcone did not appear to be intoxicated, Ezzo arrested him on charges of intoxication and disorderly conduct, and took Falcone into local custody (Tr. 530–536). This arrest occurred approximately a mile and a half from the site of the parked truck (Tr. 537).

Later that morning F.B.I. agents counted 326 cylinders of mercury in the truck (Govt's Exh. 30;

Tr. 558–560). D'Avanzo's fingerprints were found on the left side of the cab's interior (Tr. 425–450, 484–495; Govt's Exhs. 18–23). The left door of the truck had been freshly painted, and under the paint the inscription "Port Equipment Renting Co." was still visible (Tr. 586–587).[4] The cab portion of the truck had been stolen in Brooklyn on May 9, 1969, while in use by a driver for the Port Equipment Renting Company. At that time it was a flat-bed truck with no dump container attached (Tr. 638–641, 660–668). The vehicle identification number on the door-post also differed from the serial number on the truck motor (Tr. 645–651, 667).

ARGUMENT

1. Petitioners separately challenge the conclusion of the court below that the "search" of the truck was lawful.[5] The viewing of the contents of the truck in Watertown by Agent Hays was not, we believe, a search within the meaning of the Fourth Amendment. The act of climbing onto the side of the truck, which was riding low on its axles and thus was clearly heavily laden, to see what might be exposed to plain view inside the open-topped body is not so unexpected or unusual, nor conducted in such a way, as to be an invasion of privacy. See *United States* v. *Lee*, 274 U.S. 559.

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[4] The name "Falcone", which had appeared in white letters on the cab of the truck when it was first spotted in front of the Caton Scrap Metal yard before the [illegible] began their surveillance, had been removed (Tr. 287, 54[illegible]61).

[5] That argument, however, is foreclosed to petitioner Falcone. He explicitly declined to join petitioner D'Avanzo's pre-trial motion to suppress (H. 9) and never raised the issue in the court of appeals.

A. In any event, there was probable cause for Agent Hays' examination. At the time that he viewed the uncovered cylinders in the back of the truck, F.B.I. agents knew of the hijacking of cylinders of mercury on June 3, 1969; they also know about a similar hijacking eight months earlier. In the period between the two hijackings, the agents, although unable to amass sufficient information to bring charges against Falcone, had gathered credible information that Falcone had been involved in the disposition of the prior shipment of stolen mercury (H. 185–187). When the agents learned of the later theft of mercury, they regarded Falcone as a possible suspect, especially since he operated a scrap metal yard a few blocks from the site of the second hijacking (H. 185). Moreover, the manager of a trucking company located across the street from Falcone's place of business had informed an F.B.I. agent that a week before the second hijacking Falcone had asked the manager whether he handled mercury (H. 272–274). The agents thus had good reason to place under surveillance the dump truck, obviously heavily laden, which, when first observed, bore the name "Falcone" on one side (H. 145, 148).

During its trip to Watertown, Connecticut, the truck was in the sight of one or more federal agents. One agent, who had driven close enough to see the occupants of the truck, described them to the other agents. Agent Moresco, who knew Falcone to be a particularly heavy individual, radioed the others that one of the men just described "sounded very much like Vincent Falcone" (H. 194).

The parking of the heavily-laden truck on a U-shaped street in a residential neighborhood in the early hours of the morning, and the flight of its occupants into the woods, coupled with the prior information about Falcone, justified the finding of probable cause. See *Chambers* v. *Maroney*, 399 U.S. 42, 48.[6] In making this determination, knowledge received by one officer is properly imputable to the others. Contrary to the argument of petitioner D'Avanzo (Pet. No. 71–22, p. 12), it is irrelevant that the inspection of the truck was not personally conducted by the agent who had initiated the surveillance, or by the one who had testified as to the information regarding Falcone's connection with the prior theft of mercury. The agents were acting, not as separate individuals, but as a unit in a common undertaking. *Smith* v. *United States*, 358 F.2d 833 (C.A. D.C.), certiorari denied, 386 U.S. 1008; *United States* v. *Romero*, 249 F.2d 371 (C.A. 2); *United States* v. *Pitt*, 382 F.2d 322, 324–325 (C.A. 4); see *United States* v. *Ventresca*, 380 U.S. 102, 111.

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[6] Petitioner Falcone's reliance on *Coolidge* v. *New Hampshire*, No. 323, October Term 1970, decided June 21, 1971, is misplaced. In the instant case, unlike *Coolidge*, the truck was parked on a public street in a residential area which was clearly not its intended destination; there was every indication that it would be moved again before it was unloaded. It had been driven from Staten Island, New York, to Watertown, Connecticut for what could reasonably be believed to be an illegal purpose. The driver and his passenger, far from being cooperative with the federal agents, fled the scene when the agents approached. Thus, this case is materially different from *Coolidge* on its facts and the decision by this Court in that case is inapposite here.

B. Moreover, as the district court found, petitioners' conduct on their arrival in Watertown, Connecticut, could properly be viewed as manifesting an intent to abandon the stolen truck. The facts that they parked the vehicle in a residential area and ran from the site, that they never mentioned it when confronted by the police officers shortly thereafter but, instead, indicated that they were on the street at that early hour in the morning because they had no available mode of transportation, and that they never subsequently attempted to regain possession of the truck nor admitted any possessory interest in the vehicle, all support the conclusion that they had abandoned it.

In resolving the issue of abandonment, the court's examination is not restricted to the facts known to the officers at the time of the search (Pet. No. 71-22, p. 15). Rather, the critical question is whether the truck was in fact abandoned at that time by its occupants. If so, no rights of privacy under the Fourth Amendment would have been violated, and the situation would not be one calling for the application of an exclusionary rule. The conduct of petitioners in leaving the parked vehicle, and their actions thereafter, would therefore be relevant to determine whether they had manifested an intent to abandon the truck. See *Parman* v. *United States*, 399 F.2d 559 (C.A. D.C.), certiorari denied, 393 U.S. 858.

Even though the search of the truck occurred prior to the expiration of a period of time which must pass before the State law will regard a parked vehicle as having been abandoned (Pet. No. 71-22, p. 14), that statute was not the controlling standard for determining the issue of abandonment.

2. During direct examination of the police officer who had arrested Falcone in Watertown on a charge of disorderly conduct and intoxication, counsel for Falcone requested the court to charge that the arrest had been illegal.[8] The court complied by stating (Tr. 538):

> I must tell you, ladies and gentlemen, that I conducted a pretrial hearing and that I ruled that if a person is running down the street or is walking on the street at 5:00 o'clock in the morning, or 3:00 o'clock in the morning, that I do not think that is a crime of disorderly conduct, and therefore when both of these defendants were arrested on that charge by the Watertown police that any statements that may have been made by either of these defendants after they were placed under arrest would not be admissible on this trial.

Counsel for D'Avanzo objected on the ground that the court's remark suggested that "there were or might have been statements made by the defendants that Your Honor has excluded" (Tr. 538–539), and therefore it amounted to an unfair comment on the failure of the defendants to testify. In overruling the objection, the trial court pointed out that the hearing had not been held for the purpose of determining the lawfulness of the arrest, but rather to ascertain whether

[8] At the hearing on D'Avanzo's pretrial motion to suppress, the court had concluded that petitioners' arrests on the streets of Watertown on charges of disorderly conduct and intoxication were unlawful, and that statements obtained as a result of those arrests would be inadmissible (Sept. 21, 1970 Tr. 7).

any evidence following the arrest was admissible (Tr. 539).

Petitioners claim (Pet. No. 71–22, pp. 16–19; Pet. No. 71–44, pp. 17–20) that the court's comment was prejudicial error. We cannot agree. Certainly the court's statement that Falcone's conduct did not justify an arrest for disorderly conduct was not prejudicial to petitioners. Its additional admonition to the jury that any statements "that may have been made" by either petitioner after an unjustified arrest "would not be admissible on this trial" carried with it no implication that incriminating admissions had in fact been made after arrest which were being withheld from the jury.[9]

3. Both petitioners attack what they deem to be omissions in the court's final charge.

A. Pointing to the reference to 18 U.S.C. 2 in each count of the indictment and the absence of evidence that Falcone had driven the truck which had transported the stolen mercury to Watertown, petitioner Falcone now claims fatal error in the court's failure to give an aiding and abetting instruction (Pet. No. 71–44, p. 11). No request to charge on aiding and abetting was made at trial, however, and no objection to the failure to give such a charge was interjected at the close of final instructions. Petitioner is, therefore, foreclosed by Rule 30, F.R.Cr. P., from assigning as error "any portion of the charge or omission therefore." Indeed, here the absence of such a request by Falcone's counsel might well have been an element of strategy, since

[9] The cases cited by appellants are inapposite. Most involve comments by a prosecutor in closing argument to the effect that he has evidence beyond that introduced in the case which would establish the defendant's guilt.

such an instruction would have allowed the jury to consider Falcone's guilt or innocence on a broader theory.

Similarly, petitioner Falcone's trial counsel did not request additional instructions on what constitutes "possession." The failure of the court *sua sponte* to give detailed instructions on this term of common usage does not constitute plain error.

B. Petitioner D'Avanzo argues that he was entitled to an instruction, which he proferred, to the effect that, if the jury found that he had divested himself of the truck that he was driving upon learning that it and its contents were stolen, he should be acquitted (Pet. No. 71–22, pp. 19–23). This request to charge was based upon his counsel's final argument, and upon the proof that he left the truck in Watertown and never returned to it.[10] But D'Avanzo's flight from the truck on seeing the federal agents, and his failure thereafter to return to it, does not indicate that he was unaware of the stolen nature of the property during the long drive to Watertown. Indeed, his several telephone calls in route, and the conversation with two unidentified men at the restaurant in Darien, Connecticut (*supra,* p. 4), suggest otherwise. Thus, the court properly rejected an instruction grounded solely upon an argument of counsel but totally unsupported by evidence. See *United States* v. *DeAlessandro,* 361 F. 2d 694 (C.A. 2), certiorari denied, 385 U.S. 842; *United States* v. *Gosser,* 339 F. 2d 102 (C.A. 6), certiorari denied, 382 U.S. 819.

[10] Neither petitioner presented any evidence at trial.

4. Petitioners also assign as reversible errors certain comments by the prosecutor during his closing argument. The contention is unfounded. Government counsel first outlined his burden of proving every essential element; he then reviewed the testimony of the witnesses, showing how their testimony applied to each count of the indictment (Tr. 752–774). Near the conclusion of his presentation, he referred to the testimony regarding petitioners' separate explanations to the local police preceding their arrests during the early morning hours of June 6 on charges of disorderly conduct. After suggesting that both men had lied to the police, counsel stated rhetorically, "Have we heard any evidence that the defendants subsequently went up to Watertown, Connecticut, to claim the mercury in the truck?" (Tr. 795). Objections to that comment were overruled (Tr. 796).

Government counsel then noted that, during the trial, the jury might have considered the possibility that petitioners were unaware that the truck in which they rode, or its cargo, had been stolen. He then attempted to dispel any such notion by suggesting that transporters of heavy cargo would want to know the nature of their load; and that petitioners, both of whom were involved in the scrap metal and salvage business, would be aware of the value of mercury. After objections to this argument were overruled, counsel made reference to the court's proposed charge regarding the inference of knowledge to be drawn from proof of possession of recently stolen property. The following then occurred (Tr. 800–802):

Mr. Lynch (government counsel): Ladies and gentlemen, the Judge in his charge will instruct you so that you may infer that the mere possession of recently stolen property is guilty possession, unless a satisfactory explanation—

The Court: Why don't you stop telling the jury the judge's job. Not only you, Mr. Kestnbaum and Mr. Sonenshine (defense counsel). My function is to charge the jury as to the law. Don't you tell them in advance what I am going to charge.

Mr. Lynch: Your Honor, I had a comment to make about the charge that I hoped you were going to make.

The Court: Any argument you want to make you make, but do not do it in terms of what I am going to tell the jury.

That is my job.

It is my duty.

Mr. Lynch: In connection with a certain charge that the Judge will deliver to you, ladies and gentlemen, unless there is a——

The Court: Do not state it in terms of what you think I am going to charge the jury.

Mr. Lynch: No, I won't do that. Unless the defendants advance information you are satisfied with as an explanation that is consistent——

Mr. Sonenshine: If the Court pleases, in view of the last remarks by Mr. Lynch, I respectfully move for a mistrial.

The Court: I do not now how many motions you made for a mistrial, but this one is also denied.

Mr. Sonenshine: Exception, if the Court pleases.

> Mr. Lynch: I submit to you ladies and gentlemen that the defendants haven't advanced any explanation consistent with innocence about their possession of this mercury or this truck.
>
> Mr. Sonenshine: I renew my motion and objection.
>
> The Court: Again your motion for a mistrial is denied.
>
> Mr. Sonenshine: Exception.
>
> The Court: When the time comes, ladies and gentlemen, my charge will include a charge with reference to stolen merchandise; if it is recently stolen and found in the possession of a person, what effect may be given and what inferences may be or may not be drawn by the jury.
>
> You will please leave the charge to the Court on this subject as well as any other subjects.

This colloquy demonstrates that the comments by the prosecutor, to the effect that the "defendants" had failed to "advance information" consistent with innocent possession of the mercury, related to the permissible inference that could be drawn from the fact of possession. It plainly was not a comment on the failure of petitioners to testify.

5. Contrary to petitioner D'Avanzo's contention, the evidence is legally sufficient to support his convictions for transporting the mercury and the truck in interstate commerce with knowledge of their stolen nature, and for possession of the stolen mercury. There is no dispute that D'Avanzo drove the stolen truck from

Staten Island to Watertown. Apart from the inference to be drawn from a finding that he possessed the truck and the mercury, the jury could properly have inferred knowledge from his behavior en route (*supra*, pp. 4–5) and his flight in Watertown.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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